No. 94026-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LYFT, INC., *et al.*,

Respondents,

v.

CITY OF SEATTLE, *et al.*,

Appellants.

RESPONDENT RASIER, LLC's ANSWERING BRIEF

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I. INTRODUCTION

The City of Seattle characterizes this case as one in which the trial court yielded to Rasier LLC's and Lyft, Inc.'s overreaching demands for confidentiality to the lasting detriment of the City's ability to regulate the transportation industry. It is a false narrative that wholly ignores the trial court's meticulous analysis and extensive findings, which unambiguously refute both contentions. Judge Andrus found that the Zip Code Data at issue is a "trade secret" under the Uniform Trade Secrets Act (UTSA) and that enjoining its disclosure under the Public Records Act's (PRA) "other statute" provision will have no adverse effect whatsoever on the City's use of the data for its regulatory and policymaking purposes.

This appeal boils down to whether Judge Andrus's findings are supported by substantial evidence. They are. The Zip Code Data is a trade secret because its independent economic value derives from the fact that it is not ascertainable from any other source. Judge Andrus found that Rasier treats the compiled data as highly confidential and that it uses that data to make strategic decisions on pricing, promotions and marketing. Far from requiring Rasier to forfeit the data's competitive value as a condition of doing business, the City's Ordinance and its confidentiality agreement with Rasier preserve Rasier's right to oppose disclosure of its trade secrets in response to a PRA request—which is precisely what it did.

Judge Andrus also found that Rasier was entitled to an injunction under both the UTSA's *and* the PRA's injunction standards. Thus, even if the City is right that only later standard applies (it's not), it will not affect the outcome on appeal. Substantial evidence supports Judge Andrus's findings that disclosure of the Zip Code Data will irreparably harm Rasier and is clearly not in the public interest. Not only will disclosure destroy the data's value as a trade secret, Rasier's competitors would use the data to gain an unfair competitive advantage. Weighed against this harm, and the state's strong policy in favor of protecting trade secrets, there is no countervailing need for disclosure. The City's own witnesses admitted that an injunction would not in any way impact their ability to review, analyze and use the Zip Code Data in the public's interest.

The judgment of the trial court should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly conclude that when the PRA's "other statute" exemption invokes the UTSA, the availability of injunctive relief to prohibit disclosure is governed by the UTSA's common law injunction standard, not the PRA's injunction standard? **Yes.**

2. Did the trial court properly conclude that Rasier's Zip Code Data was a "trade secret" under the UTSA based on its well-supported findings of fact that the data (a) derives independent economic value by

not being readily ascertainable from publicly-available sources, and (b) is the subject of reasonable efforts to maintain its secrecy? **Yes.**

3. Did the trial court properly conclude that Rasier was entitled to a permanent injunction under the UTSA's injunction standard based on its well-supported findings of fact that disclosure of the Zip Code Data will result in "actual and substantial injury" to Rasier? **Yes.**

4. In the alternative, did the trial court properly conclude that Rasier was entitled to a permanent injunction under the PRA-specific injunction standard based on its well-supported findings of fact that disclosure of the Zip Code Data (a) will result in "irreparable damage" to Rasier, and (b) was clearly not in the public interest? **Yes.**

III. COUNTERSTATEMENT OF THE CASE

A. Findings of Fact.

The City's misleading statement of the case barely acknowledges the extensive findings of fact made by Judge Andrus, even though the City does not challenge most of those findings. CP 2700-22. Instead, the City selectively cites to evidence to support facts Judge Andrus did not find and arguments she did not accept. To give the Court a fair picture of the facts, the following statement is based solely on Judge Andrus's *unchallenged* findings, which are verities on appeal. *Humphrey Indus., Ltd. v. Clay Street Assocs.*, LLC, 176 Wn.2d 662, 675, 295 P.3d 231 (2013). These

findings, and the findings the City does challenge, are all supported by substantial evidence, as set forth more fully in the argument section.

1. Rasier, Lyft and the Zip Code Data. Uber Technologies (Uber) is a transportation network company (TNC) that develops software and other technology allowing people to "hail" drivers using a smartphone application. CP 2702. Rasier, Uber's subsidiary, licenses the application to drivers. *Id.* Lyft has developed a competing application for drivers, and is Rasier's primary TNC competitor in Seattle. CP 2702-03.

Rasier develops software programs that capture and store a significant amount of data from its drivers and passengers. CP 2705. This data includes what is referred to as Zip Code Data, which is a compilation of information comprised of zip codes from every trip's origin and destination. *Id.*; CP 2716. Rasier compiles the Zip Code Data by running queries in the computer databases where it stores trip information. CP 2705. Lyft also captures, stores and compiles Zip Code Data. *Id.*

The TNCs consider the Zip Code Data to be extremely valuable because it allows them to track where their riders are traveling. CP 2705. This compiled information is crucial to the TNCs because they use it to understand where their business comes from and, independent of their reporting requirements to the City, both TNCs track Zip Code Data to determine where in the City to target new products and promotions. *Id.*

Rasier and Lyft treat their Zip Code Data confidentially. CP 2705. They do not disclose this data because doing so would give competitors an edge in increasing their business. *Id.* Lyft wants to see Rasier's data so that it can adjust its marketing activities, and vice versa. *Id.*; CP 2716. If the TNCs had access to the other's trip numbers by zip code, they would use it to make strategic business decisions to increase their own revenue and trip numbers at their competitor's expense. CP 2706.

The TNCs store the Zip Code Data on protected networks. CP 2717. Rasier has strict policies on employee access to its network and data. CP 2706; Exs. 202 & 203. Access is limited to certain employees on a need-to-know basis, password protected and subject to privacy and confidentiality agreements. *Id.*; CP 2717. While drivers know some components of the data—they know where they start and end individual trips—they do not have access to the compiled data. *Id.* And, when the TNCs have been required to turn over similar data to regulators in other jurisdictions, they have sought confidentiality agreements. CP 2717.

2. City Regulation of the TNCs. In March 2014, the City passed an ordinance that limited the number of TNC drivers that could be active at any given time. CP 2703. Rasier and Lyft filed a referendum to overturn the ordinance. *Id.* The Mayor thereafter convened a mediation with TNCs, the taxi industry and other stakeholders to see if they could

agree on a regulatory framework that would avoid the referendum. *Id.*

The mediation was hard-fought, but successful. CP 2703. The limitation on drivers would be lifted and, in exchange, the TNCs agreed to various conditions. One of those conditions was that they would submit quarterly reports to the City that included, among other things, the Zip Code Data. *Id.* The City understood the TNCs considered the data to be trade secrets. CP 2717. The mediation terms included a provision stating:

> The city will work to achieve the highest possible level of confidentiality for information provided within the confines of state law.

Ex. 101. Although the City took the position that it would have to comply with the PRA if the information was not exempt from disclosure, it wanted to give assurances to the TNCs regarding confidentiality to make them comfortable doing business in the City. CP 2704.

On July 15, 2014, the City enacted an ordinance reflecting the parties' agreements. Seattle Municipal Code (SMC) 6.310.540. In October 2014, the City and representatives from the TNCs began working together to develop a spreadsheet the TNCs could use to submit the data. CP 2706. The TNCs repeatedly asked for assurance from the City that the information in the spreadsheets would remain confidential. *Id.* The City assured them that access would be limited to only those employees who needed to review it for regulatory and planning purposes. *Id.*

In February 2015, Rasier asked the City to sign a confidentiality agreement regarding the data it was required to submit. The City agreed. CP 2706-07; CP 2717. The agreement states that the reports "may contain trade secrets, proprietary information, or other sensitive commercial information that Rasier considers exempt from disclosure" under the PRA. Ex. 111. Consistent with the confidentiality agreement, Rasier has marked its reports as confidential, and the City has treated the Zip Code Data received from both TNCs as confidential. CP 2707-08; CP 2717.

To further address the TNCs' confidentiality concerns, the City set up an encrypted File Transfer Protocol (FTP) site so the TNCs could securely transmit the data electronically. CP 2707; CP 2717. Moreover, the City has instituted internal protections to ensure that access to the data is password protected and limited to staff within Seattle's Department of Transportation (SDOT) and its Finance and Administration Services Department (FAS) with a need to know. CP 2707; CP 2717-18.

3. **Dispute Over First Annual TNC Report.** The Ordinance contains a provision not included in the mediation terms—a requirement that City staff prepare an annual report for the "chair of the Taxi, For-hire, and Limousine Regulations Committee" of the City Council that includes a "summary of the industry data." SMC 6.310.100. Initially, Rasier and the City worked together to come up with different ways to prepare a

report that would not jeopardize the competitive value of its trade secrets if the report were made public. CP 2710-11; Ex. 220.

In the summer of 2015, however, City staff prepared a draft report containing heat maps that identified TNC ride numbers by zip code. CP 2711; Ex. 364 & 364A. Rasier informed the City that it had no problem with the report going to the Committee if it were marked confidential, but objected to providing the heat maps to the City Council as a whole given the possibility of public disclosure. CP 2711; Ex. 260. Although City staff found Rasier's approach reasonable, City attorneys instructed City staff to inform the TNCs that they intended to release the report as-is to the Council on or after September 20, 2015. *Id.*; Ex. 249. The City did not make good on its threat and did not finalize a report. CP 2712.

B. Procedural Background.

Not long thereafter, in January 2016, a Texas resident named Jeff Kirk sent a PRA request to the City asking for the two most recent quarters of TNC data, including the Zip Code Data. CP 2701; Ex. 112. The City notified Rasier and Lyft that it intended to release the information absent an injunction and, as a result, the TNCs each filed actions (later consolidated) to enjoin the City from releasing the data on the grounds that it was a "trade secret." CP 1-6 & CP 2922-33. The

parties stipulated to a temporary restraining order preventing disclosure pending a preliminary injunction hearing. CP 7-10.

The City viewed Kirk's PRA request as a means to resolve the TNCs' objections to the draft annual report, which it believed would be a recurring issue. CP 2712. Thus, contrary to its promise in mediation to "work to achieve the highest possible level of confidentiality" for the TNC data, its confidentiality agreement and all the lengths it had gone to protect the data to date, the City chose to actively oppose the TNCs' motions to enjoin the public release of the data. CP 2712; CP 122-42. Nevertheless, on March 10, 2016, Judge Andrus granted Rasier and Lyft's motion for preliminary injunction as to the Zip Code Data. CP 264-68.

After the parties conducted discovery, in October 2016, Judge Andrus conducted a four-day evidentiary hearing on Rasier's and Lyft's request for permanent injunctive relief. CP 2701. On December 9, 2016, Judge Andrus entered 22 pages of findings of fact and conclusions of law, ruling that (1) the Zip Code Data is a trade secret under the UTSA and, thus, is exempt under the PRA's "other statute" provision, and (2) regardless of whether the UTSA's or PRA's injunction standard applies, Rasier and Lyft are entitled to a permanent injunction preventing public disclosure of the data. CP 2700-2724. Both the City and Kirk appealed.

IV. ARGUMENT

A. Standard of Review.

Interpretation of the PRA is a question of law reviewed de novo. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). Interpretation of the UTSA likewise is a question of law reviewed de novo, but the determination of whether specific information satisfies the statute's definition of a "trade secret" in any given case is a question of fact. *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 436, 971 P.2d 936 (1999).

Where a trial court considers live testimony in a PRA action, its findings of fact must be affirmed if they are supported by substantial evidence. *Zink v. City of Mesa*, 140 Wn. App. 328, 336-37, 166 P.3d 738 (2007). Substantial evidence is "evidence sufficient to persuade a rational fair-minded person the premise is true." *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012). Courts cannot disturb findings supported by substantial evidence even if there is conflicting evidence, and must defer to the trial court regarding the weight and credibility of the evidence. *Id.*; *Mueller v. Wells*, 185 Wn.2d 1, 9, 367 P.3d 580 (2016).

B. The Trial Court Properly Applied The UTSA's Injunction Standard Pursuant To The PRA's "Other Statute" Exemption.

Judge Andrus concluded that when the UTSA applies by virtue of the PRA's "other statute" provision, the UTSA's common law injunction standard applies. Nonetheless, as explained below, she specifically found that Rasier was entitled to an injunction under *either* the UTSA *or* the PRA-specific injunction standard, RCW 42.56.540. Those findings are amply supported by substantial evidence and, thus, this Court does not need to reach the issue of which injunction standard applies (and/or any alleged error by the trial court in this regard is harmless). In any event, Judge Andrus was right to look to the UTSA's standard in the first instance; where the PRA's "other statute" provision applies, Washington courts may rely on the injunctive standards set forth in that "other statute."

The PRA has specific exemptions, but also prohibits disclosure when required by an "other statute." RCW 42.56.070(1). In *Progressive Animal Welfare Society v. University of Washington* ("*PAWS*"), this Court recognized that the UTSA is such an "other statute." 125 Wn.2d 243, 262, 884 P.2d 592 (1995). The Court held that the PRA is "an improper means to acquire knowledge of a trade secret" and, thus, the UTSA "operates as an independent limit on disclosure." *Id.* Because the UTSA operates independently, the Court cited only to the UTSA's injunction provision,

RCW 19.108.020, not the PRA's injunction statute, RCW 42.56.540. *Id.* Indeed, the Court noted that the latter (formerly, RCW 42.17.330) "is a *procedural* provision which allows a superior court to enjoin the release of *specific* public records if they fall within *specific* exemptions found elsewhere in the Act." *Id.* at 257 (emphasis is original).[1]

This analysis is entirely consistent with the plain meaning of the PRA, which distinguishes between the PRA's specific exemptions and disclosure prohibited by an "other statute." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (plain meaning to be derived from statute's text and context). Specifically, the PRA requires disclosure unless the record falls within either (a) "the specific exemptions of [the PRA]" or, separately, (b) an "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070. The PRA's injunction standard does not apply here because, as *PAWS* recognized, the UTSA is not a "specific exemption" of the PRA, but rather is an "other statute which . . . prohibits disclosure." 125 Wn.2d at 262.

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[1] The City erroneously argues that *PAWS* had no reason to mention the PRA's injunction standard in this context because the state agency was the one resisting disclosure, not a "third-party." Op. Br. at 17. The PRA's injunction standard, however, draws no such distinction; it applies both when "an agency . . . or a person . . . to whom the record specifically pertains" seeks to enjoin disclosure. RCW 42.56.540.

Thus, when disclosure is prohibited by an "other statute," not a PRA exemption, courts grant injunctive relief without applying RCW 42.56.540. *Ameriquest Mortg. Co. v. Office of Atty. Gen.*, 170 Wn.2d 418, 241 P.3d 1245 (2010); *Wright v. State Dep't of Soc. & Health Servs.*, 176 Wn. App. 585, 309 P.3d 662 (2013). Conversely, this Court has invoked the PRA's standard only in cases involving express PRA exemptions—not the UTSA or any "other statute." *See Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009); *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007).[2] Notably, on appeal after remand in *Ameriquest*, this Court cited RCW 42.56.540's injunction standard only in connection with the PRA-specific exemptions, *not* in its discussion of non-disclosure by virtue of an "other statute." *Ameriquest Mortg. Co. v. Office of Atty. Gen.*, 177 Wn.2d 467, 493, 499, 300 P.3d 799 (2013).

Not surprisingly, no court that has addressed the issue has held that RCW 42.56.540 applies when the UTSA, rather than a PRA exemption, prohibits disclosure. *See Robbins, Geller, Rudman & Dowd, LLP v. State*,

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[2] The City cites *SEIU Healthcare 775NW v. Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 377 P.3d 214 (2016), as an example where a court applied RCW 42.56.540 in the context of an "other statute." Op. Br. at 18. But the only exemptions at issue were PRA exemptions—RCW 42.56.070(9) and RCW 42.56.230(1). *SEIU Healthcare*, 193 Wn. App. at 384-85. No party claimed exemption under an "other statute."

179 Wn. App. 711, 726, 328 P.3d 905 (2014).[3] To be sure, the court did not do so in *Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649, 343 P.2d 370 (2014). There, the court held that the records were not trade secrets and, thus, its discussion of injunctive relief was dicta. *Id.* at 660. Moreover, the question of which injunction standard should apply was never squarely presented; the trial court applied RCW 42.56.540 because both parties had relied upon it. *Id.* at 661, n.9.[4] Judge Andrus properly recognized that neither *Belo* nor any other Washington case compels application of RCW 42.56.540 where, as here, the UTSA (rather than the PRA) prohibits public disclosure—and for good reason.

The UTSA reflects Washington's strong interest in protecting trade secrets. Laws of 1994, ch. 42, § 1 ("it is a matter of public policy that the

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[3] In *Robbins, Geller*, the parties raised the issue, but the court did not reach it. 179 Wn. App. at 726. The court noted, however, that the Attorney General's Office took the position that the PRA's injunction standard did not apply because the UTSA provided the exclusive basis for enjoining public disclosure. *Id.* The AGO's brief is available at the Washington Courts website, Court of Appeals Division II – Briefs. *See* Brief of Office of Attorney General, at p. 29 ("The UTSA provides an independent statutory basis for enjoining the disclosure of trade secrets, and thus the requirements of PRA injunctions are not applicable here.").

[4] The parties' briefs are available on the Washington Courts website, Court of Appeals Division II – Briefs. *See* Brief of CBS Corp., at p. 39 ("Since TNT advocates for application of the stricter PRA standard, and because the parties all argued regarding the elements of this standard to the Superior Court, the lower court clearly considered and applied this standard in issuing the challenged injunction.").

confidentiality of such information be protected"). Under the UTSA, "threatened misappropriation may be enjoined," RCW 19.108.020(1), and courts therefore apply the common law injunction standard. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 62-64, 738 P.2d 665 (1987); *see also Nowogroski*, 137 Wn.2d at 438 (UTSA "codifies the basic principles of common law trade secret protection."). If the PRA's standard applied, a protected trade secret would be disclosed absent evidence of irreparable harm and the public's interest, *see* RCW 42.56.540—meaning that holders of trade secrets would be entitled to less protection for their secrets when they are in the hands of a government agency than they would be if those same secrets were misappropriated by a private party. Neither the UTSA nor the PRA contemplates such an absurd and unfair result.

Finally, application of the UTSA's injunction standard in PRA cases removes conflict between the Acts. After all, a key purpose of the PRA's "other statute" provision is to supplement the PRA in a way that "avoids . . . inconsistency" with other laws and/or preemption by federal law. *Ameriquest*, 170 Wn.2d at 440; *Freedom Found. v. Dep't of Transp., Div. of Wash. St. Ferries*, 168 Wn. App. 278, 276 P.3d 341 (2012). By the same token, and as discussed further below, applying the UTSA's injunction standard in the PRA context advances the public interest by ensuring that trade secrets remain protected where, as here, a party must

provide them to the government as a condition of doing business. *Boeing*, 108 Wn.2d at 52 (information does not lose status as trade secrets when submitted to government). For these reasons too, Judge Andrus properly applied the UTSA's injunction standard.

C. Substantial Evidence Supports The Trial Court's Findings That Rasier Was Entitled To A Permanent Injunction Under Both The Common Law And PRA Injunction Standards.

Judge Andrus found that the Zip Code Data was a trade secret under the UTSA, and that Rasier was entitled to a permanent injunction because—under the UTSA's common law injunction standard—disclosure would result in "actual and substantial injury." CP 2718; *Tyler Pipe Indus. v. Dep't of Rev.*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). The Court further found that, even under the PRA's injunction standard, Rasier was still entitled to injunction because disclosure "would clearly not be in the public interest and would substantially and irreparably damage" Rasier. CP 2720. The City cannot escape these findings, all of which are based on the substantial evidence and witness credibility that Judge Andrus considered and weighed over the course of a four-day trial.

1. The Zip Code Data Is A Trade Secret.

The City cites the UTSA's definition of a trade secret in passing, *see* Op. Br. at 33, but that "expansive" definition controls. *PAWS*, 125 Wn.2d at 262. Under the UTSA, a trade secret is any information that:

> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4). Although the City suggests that the information must also be "novel or unique," Op. Br. at 33-36, the UTSA imposes no such additional requirement. Washington courts merely recognize that proof of novelty or uniqueness is relevant to the first prong of the test. "To be a trade secret, information must be 'novel' in the sense that the information must not be readily ascertainable from another source." *Robbins, Geller*, 179 Wn. App. at 722 (quoting *Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 578, 983 P.2d 676 (1999)). In any event, as explained below, the Zip Code Data is novel and unique.

The City next tries to avoid substantial evidence analysis by framing the issue as a legal one—whether the Zip Code Data is a "compilation." Op. Br. at 33-39. This too is a non-starter. Whether the Zip Code Data is a compilation under the UTSA is a factual inquiry, *Nowogroski*, 137 Wn.2d at 442, and Judge Andrus found that it is. CP 2716 ("the data . . . is a compilation"). The City does not challenge that finding, so it is a verity on appeal. *Humphrey*, 176 Wn.2d at 675. And, in the end, it does not matter. A trade secret is any kind of "information"

that satisfies the two-prong test—a compilation being just one example. RCW 19.108.010(4). The Zip Code Data is plainly "information."

In a final effort to dodge the findings of fact, the City claims that Judge Andrus failed "to analyze each category of data separately." Op. Br. at 34. But the City never objected to considering the two types of Zip Code Data together nor argued that the analysis would be different for each. Even now, the City makes no effort to explain any distinction. The argument is waived. *Buchsieb/Danard, Inc. v. Skagit County*, 99 Wn.2d 577, 581, 663 P.2d 487 (1983); RAP 2.5(a). And, regardless, there is no relevant difference between the two types of Zip Code Data, which Judge Andrus carefully defined. CP 2701. The evidence was undisputed that "the data is essentially . . . the same. One is just a pivot table off of [the] other." Tr. (10/10/16 p.m.) at 95. At bottom, then, the only issue is whether the Zip Code Data satisfies the UTSA's two-prong test. It does.

a. The Zip Code Data Has Independent Economic Value From Not Being Generally Known Or Readily Ascertainable From Other Sources.

Judge Andrus found that the Zip Code Data satisfies the UTSA's first prong based on "credible" evidence that it "has independent economic value from not being generally known to competitors." CP 2716. As noted, whether the data has such value is a question of fact and, thus, her findings—to the extent they are challenged at all—are reviewed only for

substantial evidence. The Court can easily reject the City's claim that Judge Andrus "flipped the burden of proof." Op. Br. at 39-40. She clearly found that the TNCs "demonstrated by a preponderance of evidence that their Zip Code Data are trade secrets." CP 2716. In noting that the City's witnesses were not in a position to offer testimony on the data's value, Judge Andrus simply observed that—in the absence of any expert or other contrary evidence—the TNCs' proof on the issue was *unrebutted. Id.*

Judge Andrus made the following findings of fact, among others, regarding the Zip Code Data's "independent economic value" by virtue of not being "readily ascertainable" by each TNC's competitor:

- "Both TNCs consider the data to be valuable because it tells the companies where their customers are traveling. This information is crucial to understanding where their business is coming from."

- "Lyft and Rasier track their own [Zip Code Data] to determine where they should offer new products, such as carpooling services."

- "Both Lyft and Rasier treat their Zip Code Data confidentially. They do not show this data to each other or to any other competitors because doing so would give the competitors an edge in increasing their market share."

- "Brooke Steger, Uber's general manager for the Pacific Northwest, testified credibly that she would love to have access to Lyft's Zip Code Data because she would adjust Uber's marketing activities if she knew where Lyft succeeded in gaining market share."

- "She would use Lyft's data to forecast future needs and

revenues. If she could see, for example, that Lyft had 30% of its trips coming from Bellevue into Seattle, she would know that she could increase Uber's revenue by finding a way to take some of this market because these trips are longer in duration than the shorter in-city trips."

- "Understanding a competitors revenue stream and its trips numbers by zip code would allow Uber or Lyft to make strategic business decisions to increase their own revenue and trip numbers at the expense of the competitor."

- "Rasier would love to see Lyft's Zip Code Data and vice versa in order to gain a competitive advantage over the other."

- "The Zip Code Data is not readily ascertainable by proper means by competitors. . . . While drivers and passengers know some pieces of the data, they do not have access to the compilation that Rasier and Lyft have to disclose to the City."

CP 2705-06; CP 2716-17. While the City assigns error to Judge Andrus's overall finding that the Zip Code Data "has economic value from not being generally known to competitors," *see* Op. Br. at 3 (citing CP 2716), it does not assign error to *any* of these underlying findings. *Id.* at 2-4. It can't. They are therefore verities on appeal, and they alone are sufficient to satisfy the first prong of the UTSA's definition of trade secrets.

Even if the City had challenged these findings, no matter; all are supported by substantial evidence. The City repeatedly disparages the testimony of Rasier's witness, Uber general manager Brooke Steger, as "conclusory." *See* Op. Br. at 11, 16, 31, 39-46. But Judge Andrus found

to Ms. Steger to have "testified credibly," CP 2705, and her testimony was detailed and extensive. She provided specific examples of how Rasier uses the confidential Zip Code Data to make strategic decisions, and why Rasier carefully guards the data as a confidential, including:

- "First in developing new products. . . . [F]or example, we launched a product called UberHOP. . . . And we look - - so we look at the zip code data in order to map what the best routes could have been. For example, my team believed that Queen Anne would have been the best route, but it actually showed that Ballard was the route that - - that we should launch with. So . . . we use that data to make decisions on which routes we should launch for our new hot products." Tr. (10/10/16 a.m.) at 98.

- Similarly, "UberPOOL is what we see as one of . . . the most important products . . . that's being developed. . . . And so we use zip code data in order to determine where the most lucrative places are to launch POOL. . . . So if you have a lot of trips going from . . 98109 to 98104 . . . then you know you can offer - - you can launch the product in that neighborhood. Now, . . . for example, we did not launch UberPOOL on the Eastside because the zip code data over there indicated there wasn't much traffic coming across the bridge in the morning . . ." *Id.* at 99-101.

- And, also, "most recently we launched . . . a subscription product which allows you to pay a flat rate up front at the beginning of the month. . . . Because we want people to use those products and we want to learn from their experiences on those products, and so we used the data to determine where we would actually launch that product, and then also what pricing would be . . ." *Id.* at 102.

- "So another way would be on the marketing side. . . . So we will use zip code data to determine . . . where room for growth is. Or, for example, when we launched the UberHOP product, . . . we did targeted Facebook marketing

just to those zip codes. And . . . Facebook's smallest kind of iteration of marketing, the ability for you to cut a location is zip code. . . . So that is hands down very, very important when you're doing targeted marketing, and we use that data all the time, and we're constantly running Facebook campaigns." *Id.* at 104-05.

- Further, "if we saw that we didn't have as strong a category position on the Eastside, we could purchase out of home and we could hyper target that marketing spend through digital marketing, and then we could also do targeted email campaigns just to people who took a trip within that zip code or ended in one zip code versus another or started and ended in both of those zip codes. And then we can also offer different pricing structures to certain users in order to incentivize usage during certain times and in certain areas of the city or in the county." *Id.* at 105-06.

- "We may have plenty of riders but our supply [of] drivers may not be sufficient. . . . And then we can actually offer different incentives to drivers as well to bring them into a neighborhood. . . . [T]here's demand but it's not being met because the ETAs are too long or there aren't enough drivers there, we could institute a Facebook marketing campaign just for driver acquisition based on zip code. We could offer driver incentives to that area." *Id.* at 107.

- "We use it every day to make business decisions, . . . from where we're going to run a marketing campaign to where to position supply, and then also where our opportunities for business growth are and where we should invest more time and energy and where we should grow. . . . That's the inner workings or our business and what my team is dedicated to working on . . . , which is making operational business decisions that are best for the city and best for the company and best for our riders and drivers." *Id.* at 111.

- "[T]hen when you go to analyze the success of that type of campaign, or if you see a competitor potentially launching a similar campaign, you'll go back and look at the ZIP code data to assess if the trips grew or shrunk in that given ZIP

> code, to analyze the success and effectiveness of that marketing campaign." Tr. (10/10/16 p.m.) at 62.

Lyft's witness, Mr. Kelsay, testified similarly—explaining how Lyft derives independent economic value from the use of its own confidential Zip Code Data. Tr. (10/11/16) at 79-82, 85-99, 118-22.[5]

This unrebutted testimony was more than enough to show that the Zip Code Data has "independent economic value." RCW 19.108.010(4). The City misses the point when it argues that Rasier was required to show how much it cost to create the Uber App. Op. Br. at 40-41. Courts look to the "effort and expense" to assess competitive value; the more resources expended to create something, the less likely it can be duplicated and the more value it has. *See Nowogroski*, 137 Wn.2d at 438; *Kassa Ins. Servs., Inc. v. Pugh*, 2014 WL 1746059, *3 (Wn. App. Apr. 29, 2014). The trade secret is the Zip Code Data itself—not the software code or algorithms used to collect or compile that data. And the effort and expense associated with that data is reflected in the thousands of drivers, tens of thousands of

[5] This Court can dismiss the City's silly argument that Rasier would have submitted a PRA request to the City for Lyft's Zip Code Data if it truly considered the data valuable. Op. Br. at 43-44. As Ms. Steger explained, Rasier did not do so because it would be contrary to Rasier's position that the data is a trade secret and would undermine its efforts to keep it protected. Tr. (10/11/16) at 50-52, 55 ("we typically don't issue public records requests for company data that we believe to be confidential"; Rasier will not "set the precedent of putting in a [request] to a city for data that we believe should be confidential.").

riders and hundreds of thousands of trips from which the data is compiled—not the mechanical task of putting the data into the City's spreadsheet.[6] Put simply, the Zip Code Data's value derives from the fact that it cannot be duplicated at *any expense.*

There is likewise no merit to the City's claim that the Zip Code Data lacks competitive value because it is "in the public domain" and/or "done in the public view." Op. Br. at 35-37, 44-45. The City's argument is based on the fact that drivers with Rasier and Lyft, some of whom use the apps of both companies, know the zip codes of their own particular trips. *Id.* But it is the *compiled* data drawn from hundreds of thousands of trips, not one-off trips, that is the trade secret. "A trade secrets plaintiff need not prove that every element of [a] . . . compilation is unavailable elsewhere. Such a burden would be insurmountable since trade secrets frequently contain elements that by themselves may be in the public domain but together qualify as trade secrets." *Boeing*, 108 Wn.2d at 50 (citation omitted). As explained, Judge Andrus's unchallenged findings show that no driver has access to the *compiled* Zip Code Data. CP 2706;

[6] Indeed, Ms. Steger testified that, on a day-to-day basis, the Zip Code Data is more important to Rasier's operations in Seattle than any other algorithm associated with the Uber App. Tr. (10/11/16) at 59.

CP 2717 ("drivers and passengers . . . do not have access to the compilation").

Nor is that compiled data available from another source; Rasier's, Lyft's and the City's witnesses all agreed that neither TNC's Zip Code Data can be replicated. Tr. (10/10/16 a.m.) at 95-98; Tr. (10/11/16) at 85-86, 121; Tr. (10/25/16) at 109-10, 183, 214-15.[7] Because the compiled data is not readily ascertainable from other sources, there is no need to show that the means by which it was compiled were novel or unique. Op. Br. at 36. As the City's own authority shows, only when the underlying information is commonly available to or generally used by competitors is it necessary to show innovation in the manner in which it was compiled. *See McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn. App. 412, 426, 204 P.3d 944 (2009); *Woo v. Fireman's Fund Ins. Co.*, 137 Wn. App. 480, 488-90 154 P.3d 236 (2007); *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 327, 828 P.2d 73 (1992). In short, it is not the way the TNCs compile the Zip Code Data that is a trade secret; it is the data itself.

[7] Ms. Main-Hester postulated that someone could hire hundreds of observers to follow Rasier and Lyft drivers around town to record the tens of thousands of trips they make each day, but she did not know how many observers it would take, how much it would cost or how accurate the information would be. Tr. (10/25/16) at 214. Judge Andrus properly rejected the notion that the compiled Zip Code Data was "readily ascertainable" through this kind of unfeasible scheme.

In any event, the Zip Code Data is both novel and unique in the only way that matters under the UTSA; as Judge Andrus's unchallenged findings show, and substantial evidence proves, Rasier's competitors want that data, they do not have it, and they cannot duplicate it. CP 2705-06; 2716-17.[8] As Ms. Steger explained: "we're the only ones that have [the] specific customer set that we do. . . . [N]o other application has access to the exact data that we do." *Id.* at 97-98. In this respect, the Zip Code Data is like sales data or customer lists that companies compile in the course of their business; that information is a trade secret so long as it has economic value by not being ascertainable by competitors—even if parts of it are known. *Nowogroski*, 137 Wn.2d at 440-41; *Kassa*, 2014 WL 1746059, at *3-4; *U.S. v. Nosal*, 844 F.3d 1024, 1042-43 (9th Cir. 2016). That Rasier drivers who also drive with Lyft know the details of their own trips in no way lessens the competitive value of Rasier's compiled data as a whole.

[8] The City claims that the trial court "made no findings on how the data was compiled" and the TNCs failed to present "any evidence" on the issue. Op. Br. at 38. The City is wrong on both counts. Judge Andrus specifically found that the TNCs "have developed software programs that allow them to capture and store a significant amount of data," and they are "able to compile the Zip Code Data by running queries in their databases to extract this specific information." CP 2705. That finding, to which the City does not assign error, was based in part on Ms. Steger's detailed testimony. Tr. (10/10/16 a.m.) at 95-98.

Finally, the City claims that the Zip Code Data lacks independent value because the "quarterly data sets" are created "exclusively" for the City's regulatory purposes. Op. Br. at 9, 10, 45-47. But the TNCs do not compile the data for the City's use; they compile it for their own use. They merely provide it to the City in a specified format. Tr. (10/10/16 p.m.) at 28. Both TNC witnesses testified that the Zip Code Data provided to the City in the quarterly reports is the very same data that they use every day. *Id.* at 28-30, 60-67; Tr. (10/11/16) at 86-90, 152-53, 210-11.[9] The fact that Rasier uses the data on its databases, rather than on the City's form, is utterly irrelevant. *Nowogroski*, 137 Wn.2d at 449 ("The form of information . . . is immaterial under the trade secrets statute"). Perhaps Mr. Kelsay said it best: "what difference does it make how its presented? The data is the data." Tr. (10/11/16) at 152. Exactly. For this reason too, Judge Andrus's finding that the Zip Code Data has independent economic value is supported by substantial evidence.

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[9] The fact that the TNCs create, compile and use the Zip Code Data in the ordinary course of their businesses independent of any obligation to provide the data to the City easily distinguishes this case from *Spokane Research*, upon which the City relies. Op. Br. at 55-56. In *Spokane Research*, the credit studies at issue were created at the city's request and would not have existed but for that request; and they were used exclusively by city for public purposes (to secure a HUD loan), not by the developers in their private business. 96 Wn. App. at 571, 578.

b. The Zip Code Data Is The Subject Of Efforts That Are Reasonable Under The Circumstances To Maintain Its Secrecy.

Under the second prong of the UTSA's definition of trade secrets, the Zip Code Data must be the "subject of efforts that are reasonable under the circumstances to maintain its secrecy." RCW 19.108.010(4). Judge Andrus's detailed findings show that Rasier easily satisfied that standard:

- "Both Lyft and Rasier treat their Zip Code Data confidentially. They do not show this data to each other or to any other competitors . . . ."
- "The information is stored on protected data networks by both Lyft and Rasier."
- "[B]oth Uber and Lyft restrict their own employees' access to this data compilation. Rasier requires all employees to sign privacy agreements restricting their right to disclose the data."
- "[N]ot all employees are given access to trip data, and only employees on a need to know basis are allowed to see it."
- "Every time an authorized Rasier employees accesses the data, she has to agree to keep it confidential, via a personal cell phone, to verify that only authorized employees are accessing the database."
- "Rasier has implemented policies on employees' use of its network and data access. Exs. 202-203."
- Drivers do have access to some of this data—each driver would know where they start and end trips. But no driver has access to the compilation provided to the City . . . ."
- "The mediation terms include a provision that '[t]he city will work to achieve the highest possible level of

confidentiality for information provided within the confines of state law.' Ex. 101."

- "While developing these templates, the TNCs repeatedly asked for assurance from City employees that the information in the spreadsheets, when submitted, would remain confidential."

- "The City agreed to the terms of Rasier's Confidentiality Agreement under which it acknowledged that the records Rasier produced 'may contain trade secrets, proprietary information, or other sensitive commercial information that Rasier considers exempt from disclosure' under the PRA. Ex 111."

- "As a result of confidentiality concerns raised by both Lyft and Rasier, the City set up an encrypted File Transfer Protocol (FTP) site for the TNCs to submit the required quarterly reports. Ex. 106. This secure FTP site allowed the TNCs to transmit the data electronically in a way that prevented public access to it."

- "Before the FTP site was available, Rasier hand-delivered the data to the City on a CD to avoid any compromise of the information."

- "When Rasier initially submitted its quarterly reports to the City, it marked all of the submittals as confidential, consistent with the Confidentiality Agreement it executed with the City. . . . Once the secure FTP site was available, Rasier only submitted its data via this secure site."

- "Although the TNCs have been required to disclose similar types of data in other jurisdictions, they have not done so willingly. Moreover, whenever the companies have turned the data over to regulators . . . they sought confidentiality agreements."

CP 2705-07; CP 2717. The City cursorily claims that Judge Andrus's findings are "unsupported," *see* Op. Br. at 47, but it does not assign error

to any of them, much less try to explain away the unrebutted evidence upon which they are based. *See* Tr. (10/10/16 a.m.) at 70-78, 82-85, 89-94; Tr. (10/11/16) at 40-41; Exs. 106, 128, 147, 202, 203, 304. It can't. These unchallenged and well-supported findings are verities on appeal.

Rather than addressing the findings, the City knocks down various straw-men—none of which show that Rasier was cavalier about the secrecy of the Zip Code Data. *First*, the City again points to the fact that some drivers using the Uber App also use the Lyft app and, when they do, there is no restriction on how they use information. Op. Br. at 47. But, as discussed, the trade secret at issue is the Zip Code Data compiled from hundreds of thousands of trips, not the limited information that can be seen by drivers using the Uber App. As Judge Andrus found, and the City concedes, no driver has access to this compiled data. CP 2706; CP 2717.

Second, the City wrongly claims that Rasier repeatedly failed to mark its quarterly submissions as confidential. Op. Br. at 48. In fact, the submissions for the two quarters requested by Mr. Kirk were marked confidential, *see* Ex. 332—and, as noted in another unchallenged finding, the one and only submission that Rasier did not so mark was the product of a simple clerical error. CP 2717; Tr. (10/25/16) at 259. Besides, it was undisputed that the City knew Rasier (and Lyft) considered the Zip Code Data to be a trade secret, and thus treated the data as confidential

regardless of how it was marked—as reflected in the City's creation of an encrypted FTP site for submission, its internal protocols for use, and its response to Kirk's PRA request. CP 2707-08, 2717.

Third, the City suggests that Rasier somehow waived the Zip Code Data's confidential status by "failing to appeal adverse rulings allowing disclosure of *similar* data in other cases or jurisdictions." Op. Br. at 48. None of these cases involved the threatened public disclosure of Zip Code Data. *See* Ex. 307 (Spokane: "payments made to the City"); Ex. 310 (King County: "gross number of licenses issued"); Tr. (10/11/16) at 27-33, 74. If anything, the record confirms that Rasier has aggressively sought to prevent disclosure of all its trade secrets through litigation when necessary. *Id.* Whether it chooses to appeal adverse rulings in other cases involving other types of data says nothing about the extraordinary measures it has taken to preserve the secrecy of Zip Code Data here.

Finally, Rasier has never claimed that the Zip Code Data is a trade secret because the City has an "obligation" to treat it as such. Op. Br. at 49-50. Rather, as Judge Andrus recognized and her unchallenged findings show, Rasier's negotiations with, assurances from, and agreements with the City—including the mediation terms (Ex. 101 (Ex. B)), confidentiality agreement (Ex. 304), and security protocols (Exs. 106, 119, 128 & 147)—reflect the reasonable measures Rasier took to protect the confidentiality

of the Zip Code Data and its reasonable expectation that the City would do the same. CP 2704-08, 10-12. The City may be correct that none of the protections Rasier sought (and the City agreed to) prevent the City from reneging on its promises and opposing requested injunction, but neither do they permit it—or this Court—to ignore the data's confidential status.

For all these reasons, Judge Andrus's exhaustive and largely unchallenged findings support her conclusion that the Zip Code Data is a protected trade secret under the UTSA and, thus, prohibited from public disclosure under the PRA's "other statute" provision.

2. Disclosure Of The Zip Code Data Would Subject Rasier To Actual, Substantial *And Irreparable* Harm.

The City argues that Judge Andrus "made no findings that disclosure would cause 'substantial and irreparable damage' as required by the PRA." Op. Br. at 27 (citing RCW 42.56.540); *id.* at 14 n. 7 ("order makes no finding whatsoever as to 'irreparable damage'"). As explained above, no such finding is necessary because, under the UTSA, Rasier is entitled to an injunction if disclosure will cause "actual and substantial injury." *Tyler Pipe*, 96 Wn.2d at 792. The City is wrong in any event. Judge Andrus applied *both* the UTSA and PRA injunction standards, and found that public disclosure "will cause actual and substantial injury to" *and* "would substantially and irreparably damage" Rasier. CP 2716, 2718

& 2720. Like her other findings, Judge Andrus's findings on the issue of harm, including "irreparable damage," are supported by substantial evidence, and warrant a permanent injunction under either standard.[10]

In an effort to avoid that deferential inquiry, the City claims Judge Andrus committed legal error when she ruled that disclosure of the Zip Code Data constitutes "harm *per se*." Op. Br. at 28-30. She did no such thing. Judge Andrus made specific findings based on the evidence "[i]n this case" regarding Seattle's competitive TNC environment.[11] For many of the same reasons she found the Zip Code Data to have "independent

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[10] The City suggests that, even under the UTSA, the trial court lacked authority to enjoin disclosure of the Zip Code Data because there was no "actual or threatened misappropriation." Op. Br. at 29-30 (quoting RCW 19.108.020(1)). Wrong. Whether or not the City's unauthorized disclosure is a "misappropriation"—and it is, RCW 19.108.010(2)(b)(ii) —the UTSA also permits courts to take "affirmative acts to protect a trade secret." RCW 19.108.020(3). Like the *PAWS* court, Judge Andrus specifically cited this provision as authority to enjoin disclosure of trade secrets sought by a PRA request. CP 2713; *PAWS*, 125 Wn.2d at 262.

[11] Contrary to the City's wishful thinking, Judge Andrus did not misread *Versaterm, Inc. v. City of Seattle*, 2016 WL 479239 (W.D. Wash. Sept. 9, 2016), for the proposition that disclosure of trade secrets creates "harm *per se*" or a presumption of irreparable harm. She cited it because there, like here, Judge Robart found that disclosure of the trade secrets would cause irreparable harm due to "competitive disadvantages," "loss of customers," and "loss of sales to competitors." *Id.* at *7. In contrast, in *Ossur Holdings, Inc. v. Bellacure, Inc.*, 2005 WL 3434440 (W.D. Wash. Dec. 14, 2005), cited by the City, the court refused an injunction because "beyond arguing for a blanket presumption," the plaintiff provided "no evidence" of harm. *Id.* at *8. Here, like *Versaterm* and unlike *Ossur*, there is substantial evidence supporting Judge Andrus's findings on harm.

economic value" to each TNC, she similarly found that its disclosure would subject both to *irreparable* competitive harm, including:

- The TNCs "do not show this data to each other or any other competitors because doing so would give the competitors an edge in increasing their market share."
- Rasier "would use Lyft's data to target both riders and drivers in neighborhoods that Lyft served" and "would use Lyft's data to forecast future needs and revenues."
- "Understanding a competitor's revenue stream and its trips numbers by zip code would allow Uber or Lyft to make strategic business decisions to increase their own revenue and trip numbers at the expense of the competitor."
- "Rasier would love to see Lyft's Zip Code Data and vice versa in order to gain a competitive advantage over the other."
- "[O]nce the data is disclosed, [the TNCs] will lose the trade secrets they have spent time and money developing . . . ."
- The TNCs "will be able to gain an unfair competitive advantage against each other with the disclosure of this data."

CP 2705-06, 2716. In short, disclosure of Rasier's Zip Code Data would not only deprive Rasier of the unique value of the data—because once trade secrets are disclosed, they cannot be retrieved—but also because Lyft (or other TNCs and new entrants) could use that data competitively to increase rides, revenue and business at Rasier's expense. Indeed, in Lyft's case, Judge Andrus found that disclosure of the Zip Code Data would present an "existential threat." CP 2720.

This is not, in the City's words, "generic" loss. Op. Br. at 30-31. Numerous courts have found—not presumed—that misappropriation or disclosure of trade secrets will result in irreparable harm where the facts show that the information would be used by competitors to wrest away customers or market share—losses that cannot be quantified or remedied. *Optos, Inc. v. Topcon Med. Sys., Inc.*, 777 F. Supp. 2d 217, 241 (D. Mass. 2011); *Bimbo Bakeries USA, Inc. v. Botticella*, 2010 WL 571774, *15-16 (E.D. Pa. Feb. 9, 2010), *aff'd*, 613 F.3d 102 (3d Cir. 2010); *Xantrex Tech. Inc. v. Advanced Energy Indus., Inc.*, 2008 WL 2185882, *14-16 (D. Colo. May 23, 2008); *Benefit Res., Inc. v. Apprize Tech. Solutions, Inc.*, 2008 WL 2080977, *11 (D. Minn. May 15, 2008); *Wyeth v. Nat. Biologics, Inc.*, 2003 WL 22282371, at *17-18 (D. Minn. Oct. 2, 2004), *aff'd*, 395 F.3d 897 (8th Cir. 2005). That is what the facts showed here too.

Once again, the Court can easily dismiss the City's half-hearted effort to disparage the substantial evidence of harm as mere "conclusory statements." Op. Br. at 31. For example, Rasier's witness, Ms. Steger, provided extensive testimony explaining how the TNCs could and would use Zip Code Data to target, and make inroads into, the other's business:

- "[I]f we were able to see where Lyft was getting category position in certain zip codes over others, we would adjust our marketing campaigns to - - reverse that effect. For example, . . . we could do an email campaign, we could do a hyper targeted Facebook campaign, we could send emails

to those users offering them a promotion, and then we could actually offer them lower pricing within our application in order to incentivize." Tr. (10/10/16 a.m.) at 106-07.

- "[I]f I was able to acquire someone else's zip code data, I would put that [data] into our forecasting . . . . [I]f 95 percent of the trips start and end within downtown Seattle, you go to anyone's website, figure out the average for that would be, and then you can actually map out what the total revenue for that company would be based on the zip code data. . . . That would be extremely helpful. Again, I think we would use it to issue marketing campaigns." *Id.* at 110.

- "[I]f I were a competitor looking at entering this market, I would very much love to see that data to understand what my projected revenues may be and then also where in the city or where in the county I should launch." *Id.* at 110-11.

- "I know if I got the data I would dig into potential marketing campaigns. I would also look at past campaigns. So, for example, I know Lyft put up billboards on 15th Avenue. I would love to acquire that data to see how effective those were. . . . I would love that data to go back and look at the effectiveness of the various marketing campaigns that competitors have run. And I see it detrimental to both of us should it be released, as well as any future competitor." *Id.* at 112.

- "We would be harmed by the release of the data, given the fact that we are the only people currently in possession of the data in our industry . . . because they would have insights into our business and understand what decisions we're making and why, in a way they wouldn't be able to before." Tr. (10/10/16 p.m.) at 5.

- "[I]f Lyft then got ahold of that data, they could look at the overall pattern for that ZIP code, and then actually compare it to the neighboring ZIP code, to see if there was a bump in growth for 98109 versus 98108, and if they were decoupled, something that impacted the growth in one ZIP code over another . . . ." *Id.* at 69.

- "You could also look at it on a ZIP code basis, if they launched the product, let's say in Seattle only, if there was a measurable shift in downtown Seattle versus the east side, again, with marketing campaigns, as well." Tr. (10/11/16) at 62.

Ms. Steger's testimony on how disclosure of the Zip Code Data would harm Rasier was unrebutted, as was Mr. Kelsay's similar testimony on behalf of Lyft. *Id.* at 83-85, 94-99, 113-114, 180 ("they would use it to potentially change their product offers, and certainly would use it to change pricing, to undermine us, to take our passengers"). Indeed, Mr. Kelsay admitted that if Rasier's data were disclosed, Lyft would use it "to inform our business decisions around the product choices that we make, the promotions, the pricing, the marketing, everything." *Id.* at 96-97.

The City also claims that Judge Andrus's findings are unsupported because the TNCs cannot "quantify" the harm they would suffer. Op. Br. at 31-32, 42. The Zip Code Data has not been disclosed, so there is no harm to quantify. Indeed, this is the exact situation in which injunctive relief is most appropriate. The difficulty in calculating losses caused by disclosure of trade secrets is a basis to find irreparable harm—not to reject it. *See SBM Site Servs., LLC v. Garrett*, 2011 WL 7563785, *5 (D. Colo. June 13, 2011) (irreparable harm because it "is difficult to calculate with any precision in monetary terms the damage to SBM in the competitive marketplace resulting from . . . use of SBM's trade secrets."). Both TNC

witnesses provided unchallenged testimony that it would be impossible to quantify the losses they would incur if the Zip Code Data were released. Tr. (10/10/16 p.m.) at 4; Tr. (10/11/16) at 114. [12] Judge Andrus's finding of irreparable harm was well-supported for this reason too.

That leaves the City's argument that this Court can ignore Judge Andrus's findings of harm because "similar data was released in other markets . . ., and each time . . ., the businesses of both TNCs increased after the data was released." Op. Br. at 10-12, 31-32. As noted above, the purported effect of these prior disclosures is irrelevant because, with one exception, none involved Rasier's Zip Code Data—and the generalized data at issue in those cases is far different than the granular data at issue here. *See* Ex. 307 (Spokane: "payments made to the City"), Ex. 310 (King County: "gross number of licenses issued") & 333-40 (Seattle: total trips).

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[12] The City's argument that Rasier must "quantify" its harm confuses the issues. Injunctive relief is Rasier's only remedy. Unlike a plaintiff in a misappropriation case—who may be denied an injunction on the grounds that it can receive an adequate remedy at law in the form of damages or royalty—Rasier cannot seek such a remedy under the PRA if the Zip Code Data is released. In that sense, it can be argued that a PRA disclosure of competitively valuable trade secrets is always irreparable in financial terms. *Cf. Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 756, 174 P.3d 60 (2007) ("It may be that in most cases where a specific exemption applies, disclosure would also irreparably harm a person or a vital government interest."). While Judge Andrus did not need to reach the issue of whether PRA disclosure of trade secrets would always constitute irreparable harm, substantial evidence supports her finding that disclosure of the Zip Code Data would constitute irreparable harm to Rasier.

The one exception is Portland, where the city mistakenly made a one-time disclosure of zip code data, apologized, and has worked to ensure it would not happen again. Tr. (10/11/16) at 24-27, 72-74. And, although it is impossible to know the precise effect of that wrongful disclosure, Rasier observed less growth than expected in the Portland market. *Id.* at 27, 74.

Just as important, the premise of the City's argument is factually and logically flawed. The fact that the number of Rasier's riders grew in a given market following release of this other data does not mean there was no harm, and the same would be true if the Zip Code Data were released. As Judge Andrus recognized (Tr. (10/26/10) at 372-73), and testimony confirmed, the TNC market is new, and rapid growth is expected; in such an environment, the issue is not whether a TNC's ridership grew month-over-month, but how much *more* growth or market share it would have had, but for the disclosure. Tr. (10/11/16) at 73-74, 83-85, 115. Such harm cannot be calculated or restored—and is thus irreparable. *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) ("anticipated loss of market share growth may suffice as an irreparable harm.").

In sum, Judge Andrus's findings that Rasier's business would be irreparably harmed by public disclosure of the Zip Code Data are well-supported by substantial evidence, and unassailable on legal grounds. Thus, Rasier easily satisfied the UTSA's traditional injunction standard of

"actual and substantial injury," as well as the PRA's heightened standard of "substantial and irreparable damage." There was no error.

3. Disclosure Of The Zip Code Data Was Clearly Not In The Public Interest.

Under the UTSA, no inquiry into the public interest is necessary; Judge Andrus's determination that the Zip Code Data is a trade secret and that its disclosure will irreparably harm Rasier is sufficient to support a permanent injunction. But Judge Andrus also found that, even under the PRA's injunction standard, Rasier easily satisfied the additional PRA-specific requirement that disclosure "clearly not be in the public interest." *See* CP 2718-20 (quoting RCW 42.56.540). For the reasons that follow, to the extent they matter at all, her findings on this issue are well-supported by the evidence and entirely consistent with Washington public policy.[13]

Judge Andrus found that Washington has a strong public interest in the protection of trade secrets. CP 2718. Not only is this interest reflected

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[13] The City quotes Judge Andrus's remarks at the preliminary injunction hearing, in which she noted a public interest in the Zip Code Data. The City misleadingly suggests that the trial court "never explained why it changed its mind." Op. Br. at 20. The City omits Judge Andrus's very next statement on the issue: "But what about the competing public interest of ensuring economic vitality of the businesses [that] are operating in the city, which is a competing but not necessarily less important public interest?" Tr. (3/10/16) at 49. Judge Andrus never "changed [her] mind." Rather, after hearing all the evidence at trial and weighing these competing interests, she properly found that disclosure of Rasier's trade secrets would clearly not be in the public interest.

in the UTSA itself, but, as *PAWS* noted, the legislature had made express findings declaring the State's public policy in favor of non-disclosure:

> . . . that protection of trade secrets, other confidential research, development, or commercial information concerning products or business methods promotes business activity and prevents unfair competition. Therefore, the legislature declares it a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.

PAWS, 125 Wn.2d at 263 (quoting Laws of 1994, ch. 42, § 1). This is so because the primary goal of trade secrets law is to promote innovation and development, a goal that is thwarted absent legal protection of company confidences. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481-82 (1974). That interest is no less important where, as here, a company must share its secrets with the government for regulation. *Boeing*, 108 Wn.2d at 52. Indeed, absent trade secret protection in the regulatory context, an innovative company like Rasier would face a Hobson's Choice of either forfeiting its trade secrets or seeing its goods and services shut out of certain markets. Thankfully, the UTSA combined with the PRA's "other statute" provision ensure that companies don't have to make that choice.

The City ignores the policy in favor of protecting trade secrets, and focuses entirely on the purported usefulness of the Zip Code Data to study so-called "red-lining," to analyze traffic and other issues, and to make policy recommendations to the Mayor or City Council. Op. Br. at 20-27.

At trial, it was undisputed that the City has an interest in using the data for these purposes. But Judge Andrus found that—when compared to the strong public policy of protecting trade secrets and preventing irreparable harm—disclosure was clearly not in the public interest because it was simply not necessary for the City to achieve any of these regulatory or policymaking goals. CP 2719-20. Here, too, Judge Andrus's findings are largely unchallenged and, in any event, supported by substantial evidence.

First, the City claims the public interest requires release of the Zip Code Data "to prove or disprove the existence of redlining." Op. Br. at 21-22. Judge Andrus considered this argument and found that the "public interest in eliminating any red-lining can be served without sacrificing Lyft's or Rasier's trade secret Zip Code Data" because the City is "able to analyze the data" without disclosure, and researchers can use heat-maps "for evaluating whether red-lining is in fact occurring." CP 2719-20. These findings are based on undisputed testimony that Rasier places no restrictions on the City's use of the Zip Code Data to study possible red-lining, and that both the City staff and its outside consultants (subject to an NDA) have used the data for that very purpose. Tr. (10/11/16) at 67; Tr. (10/25/16) at 116-119, 137-45, 197; Exs. 115 & 393. Thus, the continued

protection of Rasier's trade secrets has not and will not impair the public's interest in investigating alleged red-lining.[14]

In any event, Judge Andrus found that the City "had no evidence of [red-lining] occurring at either TNC"—a finding that confirms the lack of public interest requiring disclosure of the Zip Code Data on this basis. CP 2719. Although the City takes issue with this finding, *see* Op. Br. at 22, it was based on admissions of two City witnesses (*see* Tr. (10/25/16) at 152-53, 197) and concessions from the City's counsel at trial. *Id.* at 145 ("THE COURT: And neither of you are going to contend in this case that they're redlining? MS. EVANSON: No."). Indeed, as the City's counsel recognized, the "mapping" cited by the City is not proof of red-lining; it simply shows that some areas have more trips than others. Tr. (10/26/16) at 402 ("the exhibit we put in yesterday, . . . that doesn't show redlining").

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[14] The Court can easily reject the City's argument that Judge Andrus erred in refusing to take judicial notice of a report on redlining. Op. Br. at 22. To the extent the report—which was not based on Zip Code Data to begin with—was offered to show that the TNCs allegedly engage in red-lining, it is hearsay. To the extent it was ostensibly offered to show public interest in the study of red-lining, it was irrelevant and redundant given the undisputed testimony that the City has already studied the issue and found nothing. And, regardless of its intended use, as Judge Andrus noted, because the City offered the study *after* trial was over, "none of the parties had the opportunity to question witnesses about it on direct or cross examination." CP 2697-98. There was no abuse of discretion.

Second, the City claims that the public interest demands disclosure of the Zip Code Data because it is "essential to analyze the effectiveness of the City's regulatory scheme" with respect to traffic, pollution, curb space and other issues. Op. Br. at 23-24. But, much like the red-lining issue, the City's own witnesses confirmed that the data does not need to be disclosed for the City to analyze these issues. As Judge Andrus found:

- "[N]either Lyft nor Rasier seek to deny SDOT or FAS access to this data for traffic planning or enforcement purposes."
- "Neither TNC has placed any restrictions on how SDOT or FAS reviews, analyzes, or uses the data in making regulatory or transportation policy recommendations to the Mayor or to the City Council."
- "[N]either Lyft nor Rasier have denied access to the Zip Code Data to any city employee who needs to review it for analytical purposes."
- "SDOT Mobility Program Manager Cristina Van Valkenburgh testified that her staff can do its analysis without disclosing the Zip Code Data publicly."
- "She also testified that her staff could complete the needed transportation planning using aggregate or anonymized data, without needing to know the identity of each transit provider."
- "To date, the City has been able to use the TNC data to look at issues such as traffic congestion and transportation planning without disclosing the data to the public."

CP 2719. The City does not assign error to any of these findings, nor could it; the evidence was overwhelming and undisputed. Tr. (10/10/16

a.m.) at 71; Tr. (10/10/16 p.m.) at 37, 44-45; Tr. (10/11/16) at 66-67, 172-73, 223-224; Tr. (10/25/16) at 107-108, 110-113, 116-119, 155-56, 158, 163-67. For both reasons, these verities are unassailable on appeal—and they too unequivocally refute any purported public interest in disclosure.

Third, and finally, based almost entirely on the testimony of one of its witnesses, Kara Main-Hester, the City argues that without the ability to disclose the Zip Code Data, City staff cannot "use the data to recommend regulatory changes" to the City Council through the Ordinance's annual reporting requirement. Op. Br. at 24-27. Like the City's other hyperbolic claims regarding the need for public disclosure, Judge Andrus specifically considered this assertion and rejected it on the facts, finding:

- "An injunction does not in any way impact SDOT's or FAS's ability to analyze the data provided by Lyft or Rasier and make recommendations to the City Council."

- "While the staff would like to disclose trade secret information to the City Council members through the release of its annual report, the Court does not find persuasive the contention that SDOT and FAS cannot adequately advice the Council without disclosing the TNC trade secret information."

CP 2719. Not only are these findings—like all the others—supported by substantial evidence, Judge Andrus specifically dismissed Ms. Main-Hester's contention to the contrary as "not . . . persuasive." The record provides no basis to disturb the trial court's credibility determination.

To begin with, the Ordinance does not require the City to provide the City Council with a report that would disclose the Zip Code Data. Rather, it requires the City to issue a report to the "*chair* of the Taxi, For-hire, and Limousine Regulations Committee" that includes a "*summary* of industry data reported." SMC 6.310.100 (emphasis added). The report is not intended for the City Council or even the Committee as a whole, much less the public. Nor does its summary requirement mandate disclosure of any actual data, much less the Zip Code Data. Although Ms. Main-Hester conceded that the Ordinance gives the City discretion in how to prepare the report, she insisted that, regardless of what format the report takes, it ultimately requires disclosure of the Zip Code Data "line-by-line" to the City Council and, by extension, the public. Tr. (10/25/16) at 218-19, 269-70. Judge Andrus properly rejected that assertion as wholly contrived.

Indeed, were Ms. Main-Hester's understanding of the Ordinance correct, it would mean that Rasier's trade secrets would become public every year, when the City issued its report. Such an interpretation would not only contradict the assurances made by the City to Rasier at mediation and in the confidentiality agreement, it would impermissibly render the Ordinance's notification provision meaningless. *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). That provision states that if a request is made "for documents that have been designated . . . as

confidential or proprietary, the City shall provide third party notice to the providing party prior to disclosure." SMC 6.310.540(D). By its terms, the Ordinance *presumes* that Zip Code Data may be exempt from disclosure notwithstanding the annual report to the chair summarizing that data. If the Ordinance required public disclosure, what is the point of giving the TNCs notice of PRA requests and an opportunity to object?

In any event, Rasier did not seek to obstruct the City's use of the report for its policymaking purposes. On the contrary, when the City informed Rasier that the report would contain heat maps that disclosed the Zip Code Data, Rasier told the City that it had no objection to the City providing the report containing that information to the Committee chair, the Committee members, or the Mayor's office, so long as it was not made public. Tr. (10/10/16 a.m.) at 80-82; Tr. (10/10/16 p.m.) at 37, 42-45; Exs. 220 & 260. Ms. Main-Hester admitted that this proposal was "reasonable on its face," and only changed her mind once "City attorneys got involved." Tr. (10/25/16 p.m.) at 251-52; Ex. 260. Rasier also worked with City staff for weeks to come up with a version of the report that could be made public without revealing Rasier's trade secrets. *Id.* at 227-28, 230, 236-37; Tr. (10/10/16 p.m.) at 37-38, 45, 48-49; Ex. 129. To no

avail. It was the City's attorneys, not the TNCs, who instructed City staff to withhold the report. Tr. (10/25/16) at 231-33.[15]

And, although the Ordinance does not require it, if the City wants to prepare a report that can be shared publicly, it can do so without divulging the Zip Code Data. For example, as Judge Andrus found:

> Additionally, the 'heat maps' can be publicly disclosed without a legend showing the specific number of rides originating and ending in particular zip code areas of the city. Such a map would show the public where TNC service is highest and lowest . . .

CP 2719. Here, Judge Andrus rejected Ms. Main-Hester's unsupported opinion and accepted Ms. Steger's and Ms. Van Valkenburgh's testimony that the TNC data can be reported in ways the protect the secrecy of the

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[15] The City's flip suggestion that the Committee chair or members could not review the report without triggering the Open Public Meetings Act (OPMA) is baseless. Op. Br. at 25-26. The OPMA does not mandate disclosure of records (and cannot supersede the PRA in any event, *see* RCW 42.56.030), nor does the independent review of documents by city council or committee members trigger the OPMA's notice requirement. *Equitable Shipyards, Inc. v. Dep't of Transp.*, 93 Wn.2d 465, 482, 611 P.2d 396 (1980) ("Independent separate examination of the documents constituted neither an 'action' nor a 'meeting' under the act. See RCW 42.30.020(3) and (4)."). Further, the OPMA applies to the actions of a committee only if it "acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2). That only occurs only when the committee "exercises actual or de facto decision-making authority for a governing body," not when it "provides advice or information to the governing body." 1986 Op. Att'y Gen. No. 16, at 6-7 (interpretation adopted by *Citizens Alliance for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 359 P.3d 753 (2015)).

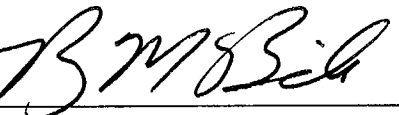
Zip Code Data—ways that Rasier and Lyft proposed, but the City ignored. Tr. (10/10/16 p.m.) at 38-39; Tr. (10/11/16) at 73; Tr. (10/25/16) at 155-56; Exs. 129, 138, 150, 151, 220 & 260. There is no basis to reject Judge Andrus' resolution of this conflicting testimony. For this reason as well, to the extent it matters at all, the preservation of Rasier's trade secrets under the UTSA does not comprise the City's regulatory or policymaking goals, and confirms that disclosure is clearly not in the public interest.

V. CONCLUSION

Judge Andrus carefully considered and weighed the evidence over four days of trial. She applied the correct standard for trade secrets under the UTSA. She applied the correct standard for injunctive relief under the UTSA. And, although she did not need to, she also applied the correct standard for injunctive relief under the PRA. Thus, the *only* issue on appeal is whether Judge Andrus's findings of fact are supported by substantial evidence. They unequivocally are. This Court should affirm.

RESPECTFULLY SUBMITTED this 16th day of June, 2017.

LANE POWELL PC

By 

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CERTIFICATE OF SERVICE

I, Ryan P. McBride, hereby certify under penalty of perjury of the laws of the State of Washington that on June 16, 2017, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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